TAI WENG CONSTRUCTION & ENGINEERING SDN BHD v. ASIAN INTERNATIONAL ARBITRATION CENTRE & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-505-09-2022]
13 MAC 2023

Abstract – *A question suitable for transmission of a special case by the High Court to the Federal Court must necessarily satisfy conditions provided in s. 84 of the Courts of Judicature Act 1964, the effect of which will bring about a speedy and final determination of the proceedings at the High Court. The subject of the question to be transmitted must be a constitutional provision or provisions which necessitates proper construction of its interpretation. Once the provision or provisions are interpreted, the question posed answered in the affirmative or negative will determine the dispute of the parties in the High Court.*

CIVIL PROCEDURE: *Courts – Proceedings – Reference of constitutional question by High Court – Application by Asian International Arbitration Centre ('AIAC') to transmit case to Federal Court – Whether High Court's power of judicial review extends to decision, action or omission of AIAC or its Director within meaning of O. 53 r. 2(4) of Rules of Court 2012, that is otherwise immune from civil suit – Whether question suitable for transmission to Federal Court – Whether satisfied condition under s. 84 of Courts of Judicature Act 1964 – Whether involved issue of challenging validity of legislation or interpreting provision of constitution – Whether issue pertained to illegality and irrationality which concerned statutory judicial review – Courts of Judicature Act 1964, s. 25(2) – Federal Constitution, arts. 4(1), 121(1) & 128*

CONSTITUTIONAL LAW: *Court – Judicial power – Reference of constitutional question by High Court – Application by Asian International Arbitration Centre ('AIAC') to transmit case to Federal Court – Whether High Court's power of judicial review extends to decision, action or omission of AIAC or its Director within meaning of O. 53 r. 2(4) of Rules of Court 2012, that is otherwise immune from civil suit – Whether question suitable for transmission to Federal Court – Whether satisfied condition under s. 84 of Courts of Judicature Act 1964 – Whether involved issue of challenging validity of legislation or interpreting provision of constitution – Whether issue pertained to illegality and irrationality which concerned statutory judicial review – Courts of Judicature Act 1964, s. 25(2) – Federal Constitution, arts. 4(1), 121(1) & 128*

The applicant, Tai Weng Construction & Engineering Sdn Bhd ('Tai Weng'), was appointed by the second respondent, E & D Asset Sdn Bhd ('E & D Asset'), as the main contractor to execute, design and construct a building for a housing development project. Disputes arose between the parties which led E & D Asset to repudiate the contract between the parties. Tai Weng commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') to recover monies for work done and services rendered and proceeded to serve a 'payment claim' on E & D Asset. E & D Asset served a 'payment response' and a set-off and thereafter, served a notice of adjudication wherein E & D Asset was named the 'claimant' while Tai Weng was named as the 'non-paying party'. It was to be observed that E & D Asset had never served a 'payment claim' on the applicant. Pursuant to E & D Asset's 'payment response', a notice of adjudication was served by Tai Weng on E & D Asset. Both parties subsequently served notices on the Asian International Arbitration Centre ('AIAC') under the CIPAA to register the adjudication. The AIAC informed Tai Weng and E & D Asset, respectively that, by virtue of s. 32(c) and/or s. 32(d) of the CIPAA and/or r. 2 of the AIAC Adjudication Rules and Procedure, it had registered Tai Weng's notice of adjudication as the subject adjudication ('initial decision'). This meant that the applicant was the claimant in the adjudication proceedings. However, the AIAC subsequently revoked the initial decision and proceeded to register E & D Asset's notice of adjudication in place of the applicant's notice of adjudication, which had the effect of making E & D Asset the 'claimant' ('impugned decision'). Dissatisfied, Tai Weng applied for leave to commence judicial review for an order of *certiorari* to remove into the High Court and quash the impugned decision and for an order of *mandamus* to compel the AIAC to reinstate the initial decision by registering the subject adjudication with Tai Weng as the proper claimant and E & D Asset as the respondent. Tai Weng also sought declarations to the effect that the impugned decision was *ultra vires* and/or in breach of s. 8(1) of the CIPAA and/or otherwise null and void for want of jurisdiction. The court granted leave to commence the judicial review proceedings. Some eight months after leave was granted, the AIAC filed the instant application under s. 84 of the Courts of Judicature Act 1964 ('CJA') read with art. 128(2) of the Federal Constitution ('FC') for this court to prepare a special case, in accordance with the question framed, and transmit the same to the Federal Court for determination. The question framed for the court's determination was whether the power of judicial review of the High Court, constituted under art. 121(1) read with art. 4(1) of the FC, extends to a decision, action or omission of the AIAC or its Director within the meaning of O. 53 r. 2(4) of the Rules of Court 2012, that is otherwise immune from civil suit under ss. 3 and 4 para. 1, Part 1 of the First Schedule to the International Organizations (Privileges and Immunities) Act 1992 ('IOPIA') and/or s. 34 of the CIPAA.

Held (dismissing application):

(1) A question is not suitable for transmission to the Federal Court if the conditions of s. 84 of the CJA are not satisfied. The conditions necessary for a special case for transmission to the Federal Court for determination are: (i) before the High Court, a question arises as to the effect of a constitutional provision that has a direct bearing on the matter of dispute; (ii) there is no factual dispute or that all factual findings are settled; (iii) the question must be in the form which permits an answer to be given in the affirmative or in the negative which will determine the dispute; and (iv) the determination of the question is for a speedy and final determination of the proceedings. So, the subject of the question to be transmitted to the Federal Court must be a constitutional provision or provisions which necessitates proper construction of its interpretation. (paras 20, 21 & 23)

(2) There was no issue of challenging the validity of legislation or interpreting a provision of the constitution. The case was all about statutory judicial review. The source of statutory judicial review is sub-s. 25(2) of the CJA read with para. 1 of the Schedule which allows the High Court to issue orders of, amongst others, *certiorari*, *mandamus* and declarations. Statutory judicial review permits the court to review decisions made by tribunals whether exercising administrative or *quasi*-judicial powers on administrative law grounds such as illegality, irrationality, proportionality and procedural impropriety. The issue herein was illegality and irrationality which concerned statutory judicial review. When considering such review, the court was entitled to interpret the provisions concerning immunity under the IOPIA and/or s. 34 of the CIPAA and apply established principles of judicial review including whether the decision under challenge was immune from judicial review. The question posed herein did not satisfy the conditions of s. 84 of the CJA and therefore, the question posed by the AIAC under art. 128 of the FC read with s. 84 of the CJA was dismissed with costs. (paras 24 & 33-35)

Case(s) referred to:

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 3 CLJ 593 FC ***(refd)***

Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(refd)***

Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors [2023] 3 CLJ 653 FC ***(refd)***

Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465 FC ***(refd)***

Ketheeswaran Kanagaratnam & Anor v. PP [2024] 2 CLJ 341 FC ***(refd)***

Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors (Case No: 05(HC)-7-01-2020(W)) (Unreported) ***(refd)***

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(foll)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***
Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 CA ***(refd)***
Wong Shee Kai v. Government Of Malaysia [2022] 10 CLJ 1 FC ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 7(1), 8(1), 32(c), (d), 34
Courts of Judicature Act 1964, ss. 25(2), 84, Schedule, para. 1
Federal Constitution, arts. 4(1), 121(1), 128(2)
International Organizations (Privileges and Immunities) Act 1992, s. 4, First Schedule, Second Schedule, Part I
Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996, regs. 2, 3A
Rules of Court 2012, O. 53

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Reported by S Barathi

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] The Asian International Arbitration Centre ("AIAC"), the first respondent, applied under s. 84 of the Courts of Judicature Act 1964 ("CJA") for this court a state the question, as framed by it, in the form of a special case and to transmit the same to the Federal Court for determination.

[2] The question for this court's consideration for the purpose of formulating the special case was framed as follows:

> Whether the power of judicial review of the High Court, constituted under Article 121(1) read with Article 4(1) of the Federal Constitution, extends to a decision, action or omission of the AIAC or its Director within the meaning of Order 53 Rule 2(4) Rules of Court 2012, that is otherwise immune from civil suit under Sections 3 and 4, Paragraph 1, Part 1 of the First Schedule to the International Organizations (Privileges and Immunities) Act 1992 ("IOPIA") and/or Section 34 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

[3] On 18 September 2023, after considering the cause papers, and written and oral submissions of the parties, I dismissed the application with costs.

Background Leading To The Application

[4] Tai Weng Construction & Engineering Sdn Bhd, the applicant ("Tai Weng"), was the main contractor appointed by the second respondent, E & D Asset Sdn Bhd ("E & D Asset"), to execute, design and construct a building which was for a housing development project. The parties executed a written agreement in respect of the said project. After some time, disputes arose between the parties, which led E & D Asset to issue a letter dated 3 June 2022 repudiating the contract entered between the parties for certain alleged breaches of the agreement.

[5] Tai Weng commenced adjudication proceedings under the CIPAA to recover monies for work done and services rendered. A 'payment claim' dated 5 August 2022 was served by Tai Weng on E & D Asset. In turn, E & D Asset, on 19 August 2022, served a 'payment response' and a set-off which consisted of ascertained and liquidated damages, rectification costs and additional completion payments on Tai Weng.

[6] Thereafter, on 22 August 2022, E & D Asset served a notice of adjudication, dated the same date, on Tai Weng. In the notice of adjudication, E & D Asset was named the 'claimant' while Tai Weng was named as the 'non-paying party'. It is to be observed that E & D Asset had never served a 'payment claim' on the applicant.

[7] On the same date, *ie*, 22 August 2022, pursuant to E & D Asset's 'payment response', a notice of adjudication was served by Tai Weng's solicitors on E & D Asset. On 23 August 2022, both parties served notices on the AIAC under the CIPAA to register the adjudication. It is common ground that the AIAC is responsible for the registration of a notice of adjudication under the Asian International Arbitration Centre Adjudication Rules and Procedure ("Adjudication Rules and Procedure").

The Impugned Decision

[8] The AIAC *vide* letters dated 25 August 2022, informed Tai Weng and E & D Asset, respectively, that by virtue of s. 32(c) and/or s. 32(d) of the CIPAA and/or r. 2 of the Adjudication Rules and Procedure, it had registered Tai Weng's notice of adjudication as the subject adjudication ("initial decision"). This meant that the applicant was the claimant in the adjudication proceedings.

[9] Subsequently, the AIAC revoked the initial decision and proceeded to register E & D Asset's notice of adjudication in place of the applicant's notice of adjudication. This decision had the effect of making E & D Asset the 'claimant', instead of Tai Weng ("the impugned decision").

Application For Judicial Review

[10] Dissatisfied with the impugned decision, Tai Weng applied for leave to commence judicial review, in the main, for an order of *certiorari* to remove into the High Court and quash the impugned decision and for an order of *mandamus* to compel the AIAC to reinstate the initial decision by registering the subject adjudication with Tai Weng as the proper claimant and E & D Asset as the respondent. Tai Weng also sought declarations to the effect that the impugned decision was *ultra vires* and/or in breach of s. 8(1) of the CIPAA and/or otherwise null and void for want of jurisdiction. On 28 September 2022, this court granted leave to commence judicial review proceedings for the above reliefs.

The Instant Application Under Section 84 Of The CJA

[11] On 31 May 2023, some eight months after leave was granted, the AIAC filed the instant application under s. 84 of the CJA read with art. 128(2) of the Federal Constitution for this court to prepare a special case, in accordance with the question framed, and transmit the same to the Federal Court for determination.

[12] As stated above, I dismissed the application and I now state the reasons for my decision.

The Immunity Provisions

[13] The AIAC (then known as the Kuala Lumpur Regional Centre for Arbitration) was declared by the Minister *vide* reg. 2 of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 [PU(A) 120/1996] ("the 1996 Regulations") an international organisation to which s. 4 of the IOPIA applies. The Kuala Lumpur Regional Centre for Arbitration was renamed the AIAC pursuant to the Arbitration (Amendment) Act 2018 on 28 December 2018.

[14] The question posed by the AIAC refers to s. 4 of the IPOIA jointly and also independently of s. 34 of the CIPAA.

[15] Section 4 of the IPOIA confers on the Minister's powers to confer upon an international organisation all or any of the privileges and immunities specified in the First Schedule of the IPOIA, amongst which, is the immunity of the AIAC from suit or legal process. The section also confers upon the person who is or is performing the duties of, a high officer of the international organisation the privileges and immunities specified in Part I of the Second Schedule of the IOPIA *ie*, privileges and immunities accorded to a diplomatic agent. The high officer of the AIAC is its director.

[16] Regulation 3A of the 1996 Regulations confers on the high officer or the director of the AIAC privileges and immunities in respect of acts and things done in his capacity as the high officer.

[17] While sub-s. 34 of the CIPAA provides that no action or suit shall be instituted or maintained in any court against the AIAC or its officers for any act or omission done in good faith in the performance of his or its functions under the CIPAA.

Section 84 Of The CJA

[18] The purpose of s. 84 of the CJA is clear. If there arises a question as to the effect of any provision of the Federal Constitution, the High Court is empowered to transmit the question to the Federal Court by way of a special case and await the determination of the Federal Court. The determination of the Federal Court will bring about a speedy and final determination of the proceedings at the High Court.

[19] To appreciate the conditions for a special case, s. 84 of the CJA is reproduced below:

> (1) where in any proceedings in the High Court **a question arises as to the effect of any provision of the Constitution** the judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
>
> (2) an order staying proceedings under this section may be made by the judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the judge may see fit **having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen** and to the speedy and economical final determination of the proceedings.
>
> (3) where an order for stay of proceedings has been made under this section the judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case **which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative**.
>
> (4) where a judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.
>
> (emphasis added)

[20] Thus, the conditions necessary for a special case for transmission to the Federal Court for determination are as follows:

(i) before the High Court, a question arises as to the effect of a constitutional provision that has a direct bearing on the matter of dispute;

(ii) there is no factual dispute or that all factual findings are settled;

(iii) the question must be in the form which permits of an answer to be given in the affirmative or in the negative, which will determine the dispute; and

(iv) the determination of the question is for a speedy and final determination of the proceedings.

[21] A question is not suitable for transmission to the Federal Court if the conditions of s. 84 of the CJA are not satisfied. The Federal Court in *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 3 CLJ 593; [2020] 2 MLRA 1; [2020] 2 AMR 433 held that the absence of actual controversy between the parties renders the question abstract and purely academic. The Federal Court declined to answer the question posed and remitted the matter back to the High Court, stating as follows:

> It is implicit in the constitutional and statutory scheme that the "special cases" suitable to be referred to and determined by the Federal Court must necessarily be subject to certain conditions.

[22] The often-quoted case on s. 84 of the CJA is the decision of the Court of Appeal in *Wee Choo Keong v. Lee Chong Meng & Anor* [1996] 3 CLJ 508. There, Abdul Malek Ahmad JCA with whom Abu Mansor Ali JCA agreed with on the meaning of "the effect of any provision of the Constitution" said:

> Read in its proper context, "the effect of any provision", in section 84 of the CJA must surely mean a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court.

[23] So, the subject of the question to be transmitted to the Federal Court must be a constitutional provision or provisions which necessitate proper construction of its interpretation. Once the provision or provisions are interpreted, the question posed and answered in the affirmative or negative will determine the dispute of the parties in the High Court.

Decision Of The Court

[24] I found that the question posed for my consideration for the purpose of solely preparing a special case to be transmitted to the Federal Court does not satisfy the conditions of s. 84 of the CJA, in particular, that a question has arisen as to the effect of a constitutional provision that has a direct bearing to the matter of dispute.

[25] The matter in dispute before me is whether the impugned decision by the AIAC of registering E & D Asset's notice of adjudication and thereby making it the claimant by revoking the initial decision wherein Tai Weng was the claimant is immune from judicial review by virtue of the immunity provision in the IOPIA and/or the ouster provision accorded for acts done in good faith under s. 34 of the CIPAA.

[26] This is clear from the cause papers and the written submissions of the parties.

[27] The AIAC submitted that the immunity and privileges afforded to the AIAC were all-encompassing and absolute and immunises the AIAC from judicial review proceedings. It was further submitted that since the impugned decision was taken in accordance with the provisions of CIPAA and the regulations made thereunder there is no absence of bad faith and is not subject to judicial review proceedings, (see para. 38 of the AIAC's written submissions).

[28] Tai Weng pleaded in its O. 53 statement that the impugned decision of the AIAC was tainted with illegality being *ultra vires* or contravening sub-s. 8(1) and misconstruing sub-s. 7(1) of the CIPAA and that the AIAC had given effect to E & D Assets's notice of adjudication that was a nullity. In the premises, Tai Weng claimed that it is the lawful claimant as it is under the CIPAA the unpaid party *ie*, the party who is due payment for work done or services rendered and whose entitlement for payment is disputed. E & D asset, on the other hand, has not raised claims for work done or services rendered but claimed alleged set-offs in defence for items that are not claimable items *ie*, liquidated ascertained damages, rectification costs and additional completion costs. It is further pleaded that E & D Asset does not fall within the meaning of "claimant" under the CIPAA and that the AIAC failed to give regard to the decision of the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22, where it was held:

> It is also significant to note that it is at this stage of the proceedings that the unpaid party is termed by the CIPAA as "the claimant", and the non-paying party as "the respondent", by which terms they are thereafter respectively referred to.

[29] It is also pleaded that the impugned decision is tainted with irrationality. The non-registration of Tai Weng as the "claimant" is a decision that no reasonable adjudicating tribunal would have made similarly circumstanced.

[30] The constitutional issue that the AIAC claims has arisen concerns the judicial review power of the High Court, as an aspect of the underlying and broader, judicial power of the High Court under the Federal Constitution, may be ousted by the immunities and privileges granted in law to organisations or individuals such as the AIAC, and international organisation formed under an international treaty between the Government of Malaysia and the Asian-African Legal Consultative Organisation (AALCO).

[31] The question posed by the AIAC is an attempt to make something tolerable plain *ie*, the direct application of the principles of judicial review into a constitution question which is not the case. I am unable to agree with counsel that a constitutional question within the meaning of s. 84 of the CLA has arisen. I find no question of the interpretation of art. 121(1) and art. 4(1)

of the Federal Constitution is required for determining the dispute before me. First and foremost, recent decisions, which I am bound by, clearly show that the broader power referred to by the AIAC concerning judicial review of the High Court under arts. 4(1) and 121(1) of the Federal Constitution is trite and settled law. In *Ketheeswaran Kanagaratnam & Anor v. PP* [2024] 2 CLJ 341, the Federal Court said:

> [12] Article 121(1), as it stands now, has been the subject of controversy for a long while. Much was said about its interpretation after the original art. 121(1) was amended *vide* Act A704 to its presently existing iteration. What is clear is that the interpretation to be afforded to the present art. 121(1) read with art. 4(1) **has been settled beyond a shadow of doubt by numerous recent decisions of this court**.
>
> (emphasis added)

[32] The numerous recent decisions referred to in *Ketheeswaran Kanagaratnam* are: (i) *Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (Case No: 05(HC)-7-01-2020(W)), decided on 25 April 2022; (ii) *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1; [2022] 3 MLJ 356; (iii) *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 465; [2021] 2 MLJ 323; (iv) *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339; [2022] 2 MLJ 356; (v) *Wong Shee Kai v. Government Of Malaysia* [2022] 10 CLJ 1; [2022] 6 MLJ 102. These judgments, according to the Federal Court, explain the concept of constitutional judicial review and how it is a powerful component of judicial power, separation of powers and check and balance. Constitutional judicial review was explained by the Federal Court in *Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors* [2023] 3 CLJ 653 as follows:

> [62] To build upon what was stated in *SIS Forum* (*supra*), judicial review in its broadest sense calls upon the Judiciary to examine the exercise of powers. A constitutional judicial review, whether to challenge the validity of legislation or such as in this case, to interpret the FC itself, brings to light the question of how the constitutional provision should be applied.

[33] As shown above, there is no issue of challenging the validity of legislation or interpreting a provision of the Constitution in the instant case. What the case before me is all about is statutory judicial review. The source of statutory judicial review is sub-s. 25(2) of the CJA read with para. 1 of the Schedule which allows the High Court to issue orders of, amongst others, *certiorari*, *mandamus* and declarations (when read with O. 53 of the Rules of Court 2012). Statutory judicial review permits the court to review decisions made by tribunals whether exercising administrative or *quasi*-judicial powers on administrative law grounds such as illegality, irrationality, proportionality and procedural impropriety.

[34] The issue before me is illegality and irrationality which concern statutory judicial review. When considering such review, this court is also entitled to interpret the provisions concerning immunity under the IOPIA and/or s. 34 of the CIPAA and apply established principles of judicial review including whether the decision under challenge is immune from judicial review. This is in line with the decision of the Court of Appeal in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60 the Court of Appeal which established one of the grounds that is identified as frivolous and vexatious is an application that is made against a person or body that is immunised from legal proceedings.

Conclusion

[35] Based on the aforesaid reasons, the conditions of s. 84 of the CJA are not satisfied and the application to refer to the question posed by the AIAC under art. 128 of the Federal Constitution read with s. 84 of the CJA is dismissed with costs.